No. 10,687

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STOCKTON SAND AND CRUSHED ROCK COMPANY, INC. (a corporation), *Appellant,*
vs.
JAMES R. BUNDESEN, HOWARD F. LAURITZEN, and BUNDESEN & LAURITZEN (a copartnership), *Appellees.*

APPELLANT'S CLOSING BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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APPELLANT'S CLOSING BRIEF.

Appellees, in their brief, contend that the questions herein involved are largely questions of fact, and that the conclusions of law, based on the findings, involve no "controversial" or "unsettled" principles. With this we cannot agree. Although there are findings of fact which we believe are not supported by the evidence, we believe that the application of law to facts not disputed has been erroneously made.

1. APPELLANT'S ASSIGNMENTS OF ERROR ARE SUFFICIENT.

Citing *American Surety Co. v. Fischer Warehouse Co.,* 88 F. (2d) 536, 538-539 (9 C.C.A.), and *Humphreys Gold Corp. v. Lewis,* 90 F. (2d) 896, 898 (9 C.C.A.), appellees claim that the assignments of error made by appellant are insufficient.

These assignments taken as a whole as well as individually point out in what respect the findings and the conclusions are wrong. They indicate the particular manner in which the fireman was negligent; point out the particular acts and omissions wherein negligence existed, and this is all that is required. (*American Surety Company v. Fischer Warehouse Co.,* supra.)

It is submitted that all of appellant's assignments of error comply with Admiralty Rule 3 of this Court, and that neither the Court nor appellees are misled as to appellant's contentions on appeal.

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2. APPELLANT IS ENTITLED TO A TRIAL DE NOVO.

Appellees cite six cases to sustain their contention that findings of fact of the District Court in an admiralty case are entitled to great weight and will not be reversed unless the record discloses plain error of fact or misapplication of rule of law. But, it is also said, that the Appellate Court may disregard such findings if they are contrary to the weight of evidence or are against the preponderance of the evidence. (*McAllister Bros. v. Pennsylvania R. Company,* 118 Fed. (2d) 45 (C.C.A. NY–1941).) And how is this

Court to determine this? As was said in *The Ariadne,* 13 Wall. 475, 479,

> "The right of appeal is a substantial right and not a shadow. It involves examination, thought and judgment."

We believe that "examination, thought and judgment", on the part of this Court will result in a conclusion on its part that not only is the preponderance of the evidence contrary to the findings of fact as found by the lower Court, but that also there has been a plain misapplication of a rule of law, based on the findings of fact made.

The only testimony with reference to the start of the fire and the events occurring at that time was the deposition of Fireman Westall. This Court is in as good a position as the lower Court to evaluate that evidence and we feel that it conclusively shows that the fireman was negligent, which negligence caused the destruction of the barge, as will be hereafter discussed.

An appeal in admiralty still partakes of the nature of a trial *de novo,* and it is submitted that an examination of the record will convince this Court that the decree herein should be reversed.

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3. THERE WAS NO WAIVER OR RELEASE.

An affirmative defense urged by appellees is that appellant, by failing to include on every statement sent to appellees for the rental of the barge a reserva-

tion of a claim for damage, thereby waived or released any such claim. (Ap. 33.)

In a bill dated the day after the fire, appellant notified appellees, "This statement does not release your company from further liability of settlement in connection with loss due to fire." (Ap. 88.) Appellees replied denying liability, but we have been cited to no rule of law that would require appellant to attach to every statement for rent of the barge a reservation of its claim for damages for the loss thereof.

There was no showing of any consideration for a release nor any settlement of the claim for damages.

This being an affirmative defense, the burden is on appellee to establish it. No citations of authority for their position have been given, and it is submitted that appellees have not met their burden.

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4. APPELLANT DID NOT ASSUME THE RISK OF LOSS.

Appellees' principal defense, apparently, is that appellant assumed the risk of loss because, (1) its representative stated that the barge was fully insured and (2) that appellees contend the rent of $10.00 an hour included the insurance.

An examination of the pleadings will show that appellees have shifted their ground with respect to the insurance question. In paragraph IV of their second defense (Ap. 30) appellees contend that they are entitled to the benefit of the payment of insurance received by appellant. As to the excess of the value

over the amount received under the insurance policies, appellees plead in paragraph V of their second defense (Ap. 30-31) that appellant is estopped to recover damages because of the alleged breach of the agreement to keep the barge fully insured.

Appellees rely on the testimony of Howard F. Lauritzen, one of the appellees, to the effect that Ed M. Foy, representing appellant, agreed that the $10.00 per hour included the operator, fireman, oil, water, and insurance (Ap. 170), to sustain their position that there was an agreement to keep the barge insured. This testimony was flatly contradicted by Foy who said the only conversation about insurance was that Lauritzen asked, "Have you got insurance?", and Foy replied, "We are fully covered." (Ap. 109.) Lauritzen did not say that Foy stated the $10.00 hourly charge included insurance, but claims that he, Lauritzen, stated to Foy what the $10.00 an hour included and that Foy assented.

It should be pointed out that Foy was a little deaf and that Lauritzen knew it. (Ap. 183.) It is not contended that Foy ever said the $10.00 an hour charge included insurance, and the logical inference from the testimony of Lauritzen is that if he did use the word, "insurance," that Foy did not hear it.

In Finding No. III (Ap. 227) the Court found that appellant "agreed to keep the barge fully insured". There is not one scintilla of evidence upon which such a finding could be made.

Appellees assert that we attack only Finding No. VII and not Finding No. III. (Ap. 18.) The reverse

is true. (Ap. 237.) We do most earnestly question the sufficiency of the evidence to support Finding No. III wherein that finding establishes the fact that the $10.00 an hour includes the insurance and that appellant agreed to keep the barge fully insured.

Although appellees pleaded they had the benefit of insurance and also estoppel, the Court made no findings on these issues. In Conclusion of Law IV, the Court determined that appellant had assumed the risk of loss, a defense not conceived of by appellees, apparently, until they realized that the evidence did not sustain the "benefit of insurance" theory, or the "estoppel" theory.

Even if it be conceded that the $10.00 charge included insurance, the burden is still on appellees to establish that the insurance was for their benefit, and that appellant was estopped. This, they pleaded, and this they failed to do. The testimony of Lauritzen was that Foy never said that appellees were to be protected by the insurance. (Ap. 184.)

It should be pointed out that there was no amendment of the pleadings to conform to proof.

The proofs must conform to the issues tendered by the pleadings and so also must the decree.

Second Pool Coal Co. v. Peoples Coal Co., 188 Fed. 892, Cert. Den. (1911, 223 U. S. 727).

Appellees' theory of assumption of risk, apparently, an afterthought, is based on two cases:

Newport News Shipbuilding and Drydock Co. v. U. S., 34 Fed. (2d) 100 (4 C.C.A.),

and

S. J. Brice and Sons v. Christiani and Neilsen,
30 Lloyd's List Law Reports, 177.

In the *Newport News* case, supra, the engineer of the United States, the libelant, testified that the agreement was, "understood", as giving the shipyard the protection. There was also evidence that the shipyard company had reduced its bid for the repair of libelant's ship (destroyed by fire due to the shipyard's negligence) in consideration of the agreement to carry insurance. In fact, the U. S. did not carry insurance and the decision was based on this fact. This was a two to one decision and there was a strong dissenting opinion by Justice Parker, who, after stating that the case should have been considered as if there were insurance, said:

> "In such case there would be no question as to the right of the Government to recover damages for negligence, notwithstanding its insurance. The insurance company, if it paid the policy, would be entitled to subrogation to the rights of the Government to recover damages from the shipbuilding company (see *Liverpool, etc. Co. v. Phenix Insurance Co.,* 129 U. S. 397, 463, 9 S. Ct. 469, 32 L. Ed. 788; *Inman v. S. C. Ry. Co.,* 129 U. S. 128, 9 S. Ct. 249, 32 L. Ed. 612, and *Luckenbach v. W. J. McGahan Sugar Refining Co.,* 248 U. S. 139, 148, 39 S. Ct. 63, ... L. Ed. 171, 1 A.L.R. 1522); but under no possible theory would the shipbuilding company have any right against the insurance company."

In the *S. J. Brice* case, supra, there was no demise and there was also an express agreement that the

owner of the barge insure it and the hirer was to pay for such insurance. We have no such agreement in our case.

Appellees also cite *Hall-Scott Motor Car Co. v. Universal Ins. Co.,* 122 Fed. (2d) 531, 538 (9 C.C.A.), on the point that appellees were to have the benefit of insurance, (not that appellant assumed the risk of loss). The basis of that decision was that there was an express agreement releasing the motor car company from *all* liability, and that a bailee can contract to relieve itself of all liability.

We believe that *Kennelly v. Frederick Starr Contracting Co.,* 250 Fed. 299 (2 C.C.A.), and *White v. Upper Hudson Stove Co.,* 248 Fed. 893 (2 C.C.A.), are directly in point. In the *Kennelly* case there was an agreement by the charterer to procure and pay for extra insurance, if the boat was taken into certain waters, and in the *White* case there was also an agreement for the charterer to procure and pay for extra insurance. The situation in these cases made a stronger case for the charterer than appellees have made out, and yet the Court held the charterer liable for its negligence.

The mere fact that appellant had insurance does not warrant the inference that it thereby *assumed the risk of loss by fire.* None of the cases cited by appellees so hold. In *Hall-Scott Motor Co. v. Universal Insurance Co.,* supra, it will be noted that the Court was construing the agreement to release the motor company from all liability, and in the *Newport News* case, supra, the Court was taking into consideration

the bid, and the admission of the U. S. that the agreement to carry insurance meant that it was for the benefit of the shipyard.

Since appellees have urged the benefit of insurance, and estoppel as defenses, they must establish them. The burden is on appellees who claim that the insurance was for their benefit.

It is submitted that appellees have not sustained the burden which they assumed in their pleadings. The appellees raised the question of, "benefit of insurance", and, "estoppel". These defenses were abandoned and they now urge, "assumption of risk". The cases cited do not sustain their theories, and we feel that there has been no proof of either, "benefit of insurance", "estoppel" or "assumption of risk".

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5. THE ORAL AGREEMENT WAS A DEMISE CHARTER AND THE FIREMAN WESTALL WAS APPELLEES' EMPLOYEE.

Appellees contend that the barge was operated under an agreement for services and not under a demise. The principal point urged is that the fireman, Westall, admittedly the only person on the barge at the start of the fire, and the engineer, Williams, were the employees of appellant. To establish this fact they rely on directly contradicted testimony that after the original oral agreement, the parties agreed that appellees were to furnish a crew *for* appellant, and that pursuant thereto, appellees did furnish an engineer and fireman *for* appellant.

However, in order to determine the status of the parties in relation to the barge,

> "The essential thing is to construe the agreement correctly in connection with the actions of the parties thereunder."
>
> *United States v. Shea,* 152 U. S. 178, 14 S. Ct. 519, 38 L. Ed. 403.

Applying this rule to our case, we find that appellant towed the barge to the scene where it was to be used and also towed it away after the fire. This is undisputed. Appellees took an engineer, Williams, and a fireman, Westall, from a derrick barge owned by appelles and instructed them to work on appellant's derrick barge. (Ap. 172.) These two men did go to work on the barge, and worked there for three days prior to the fire. They also worked on the day of the fire.

Mr. Ralph Foy, representing appellant, was present when the barge was delivered to appellees' job, and instructed the fireman, Westall, as to the position of the valves, the method of firing up, and greasing. (Ap. 142.) Ralph Foy then left and did not return until after the fire. (Ap. 46.) From the time Ralph Foy left, no one representing appellant had anything to do with the barge, unless the Court accepts appellees' theory that they furnished the engineer and fireman *for* appellant.

Under the agreement, appellees were to pay the wages of the engineer and fireman and charge them back against the rental. This they did with one excep-

tion—the day of the fire appellees paid these men but did *not* charge these wages back. (Ap. 94.) If these men were employees of appellant, why did not appellees make a charge for the wages paid them on May 21, 1941, the day of the fire? Appellees paid the engineer $6.60 and the fireman $6.40 for the 21st. (Ap-190.) The answer is apparent—the engineer and fireman were appellees' employees and under the agreement they were to be allowed a credit for their wages *only when the barge was being used at the agreed rental of $10.00 an hour.*

Appellees stress the testimony of Mr. Lauritzen and Mr. Kitchen, representing appellees, that the first they knew that the appellant would not furnish a crew was the night the barge arrived—on May 15th. (Ap. 198.) Is it reasonable to assume, as we must if this be true, that appellant would tow the barge up the Napa River to appellees' job without first notifying them that appellees would have to furnish the crew? Is not Captain Foy's account that he had told Mr. Lauritzen he could not furnish a crew and that Lauritzen said he had a crew—more consistent with what actually took place?

The fireman himself said that he worked on the barge for appellees the night the barge came in, and that appellees told him "the next day Foy's man would be there * * * to show me how to fire the rig". (Ap. 69.) At no time did the fireman state that he was supposed to work for appellant, although Mr. Lauritzen said he had so told the fireman.

It should also be noted that appellant's bill to appellees was for, "*rental* on Derrick Foy #2" (Ap. 93) and that appellees' bill to appellant for wages paid stated, "to be deducted from *rental* of derrick". (Emphasis ours.) (Ap. 94.) Also, in their letter of May 29 to appellant, appellees again referred to the, "rental" of the barge. (Ap. 89.) This bill also refers to, "the services" of engineer and fireman on the barge. This is not a bill for moneys advanced for appellant, but was for the services of the engineer and fireman which appellees had furnished under the terms of the agreement. (Ap. 94.)

In *United States v. Shea,* supra, it is said that the test as to whether an agreement amounts to a demise is management and control, and that, "the transfer of the exclusive possession, management and control", constitutes a demise.

Appellees apparently do not dispute this, but claim that the fireman Westall was the employee of appellant.

Let us assemble the pertinent facts:

1. The engineer and fireman were in the employ of appellees immediately prior to the time they went to work on the barge. (Ap. 172.)
2. The fireman Westall testified that he worked for appellees at the time of the fire (Ap. 43, 69); that they were his "bosses". (Ap. 44.)
3. The time cards of appellees indicate that from 8 to 12 of their men were employed on the barge. (Ap. 188, 190, 192.)

4. Said time cards also indicate that appellees paid rent for time spent in rigging (3 hours on May 16th). (Ap. 188.)
5. The time card for May 21st (Ap. 190), the day of the fire, indicates appellees paid wages to the fireman Westall and the engineer. No claim for credit was made because the barge was not working (Ap. 94) and therefore no rent was due.
6. Appellees repaired and overhauled the barge at their own expense. (Ap. 202.)
7. Appellees' superintendent locked up the crew's quarters on the barge, because "there was equipment in there we didn't want stolen, taken out, that we would have had to replace had it been lost". (Ap. 204-205.) The equipment consisted of dishes, butane stove, cooking utensils, bedding (Ap. 206), a part of the equipment of the barge.
8. Appellees' superintendent was in charge of driving sheet piling, which the barge was doing; he told the foreman who stayed with the barge on his shift what to do; he had the barge pumped out. (Ap. 214.)

Under the agreement, payment for the barge was to be made only for the time it was used and it was to be used as determined by appellees. Appellant could not know when the barge was used except for appellees to tell them. To construe the agreement as one for services would mean that appellant would have to keep a crew available at all times in order to have the barge available for use when appellees wanted to use

it. It cannot be conceived that appellant would have kept a crew idle, paying them their wages as employees and receive as revenue $10.00 an hour only for such time as the barge was in operation. That Mr. Lauritzen, one of the appellees, was conscious of the fact that he was responsible for the barge and that the fireman Westall was his employee is indicated by his admission that he was worried about the insurance company suing him on a subrogation claim. (Ap. 175.)

The barge, being without motive power, the only way it could be moved was to use some outside source of power. It is admitted that appellant towed the barge to the general location where it was to be used and also had it towed away, but while it was in operation apparently the barge was moved by appellees and this necessarily had to be from some outside source of power. Mr. Kitchen, appellees' superintendent, testified that they had to keep the barge pumped out because otherwise it would draw too much water in moving. (Ap. 200.) This also evidences the fact that appellees were in possession, control and management of the barge.

That the agreement constituted a demise and that the fireman was appellees' employee is indicated by all the acts of the parties under the agreement, and as was said before, these acts must be taken into consideration along with the agreement in determining what the actual situation was at the time of the fire.

6. THE DAMAGE WAS CAUSED BY THE NEGLIGENCE OF THE FIREMAN.

Appellant does not dispute the rule of law that the burden of proof to show negligence in a demise, such as this one, is on appellant. However, in such a demise where the barge is returned in a damaged condition, the damage occurring while the barge was in the control and possession of appellees, it becomes appellees' duty to explain how the damage occurred. (*Kohlsaat v. Parkersburg & Marietta Sand Co.,* 266 Fed. 283, 285 (4 C.C.A.), and *Commercial Molasses Corp. v. New York Tank Barge Corp.,* 314 U. S. 104, 110, 86 L. Ed. 89, 95.)

It is admitted that the barge was returned to appellant by appellees in a damaged condition and therefore it is the duty of appellees to show the cause of the loss and to show that it was not one involving their liability.

It is submitted that not only did appellees fail to explain how the fire occurred, but that appellant has conclusively shown that the damage to the barge was caused by the negligence of the fireman Westall.

Could it be denied that it would be negligence to leave a 3-year-old child playing with matches in a room filled with excelsior? Could it be denied that it would be negligence to leave an unattended bonfire in the midst of a forest? The negligence in our case is just as simple as that.

The stoppage of fuel occurring shortly after starting a fire in a boiler is not uncommon. So testified Mr.

Foss, Business Manager of Local 3 of Operating Engineers (Ap. 121), and the fireman Westall himself, who testified that it was not uncommon to have this happen. (Ap. 52.) Westall also testified that if a fireman were in attendance he could turn the fuel off when this happened and there would be no damage. (Ap. 52.) The fireman also admitted that he had told Mr. Foy and others that it, "was not good practice to go off and leave the fire alone and that he should have put out the fire when he decided to go to the toilet". (Ap. 55.) Also, the witness Ralph Foy testified, without objection, that the fireman Westall had told him it was negligence on the fireman's part to go away and leave the fire at the time he did (Ap. 141), and Westall himself testified that it was better practice not to leave the fire while it was generating, which was the case here. (Ap. 55.)

Even Mr. Kitchen, superintendent for appellees, admitted that it was not good practice to go out of the room in which the fire box was located unless you were in sight of the stack. The fireman Westall testified that he went to the stern of the barge to go to the toilet (Ap. 49), and this toilet was installed in the aft part of a living room of a "house" located on the stern end of the barge. (Ap. 131.) The fire room was located a little aft of midship of the barge and it was completely enclosed. Aft of the fire room was a water tank about 9 feet high. (Ap. 130.) It is self evident that if the fireman were at the toilet located inside this "house" he couldn't have seen the stack. It would

have been possible to have seen the stack if he had been outside the "house or cabin". (Ap. 153.)

We should also bear in mind that the equipment worked perfectly on May 16th, May 19th and May 20th, as the fireman stated that he had had no previous trouble with the boiler. (Ap. 210.) The fireman also testified that the boiler had worked perfectly the previous day. (Ap. 47.)

In evaluating the testimony of Mr. Lauritzen and Mr. Kitchen on behalf of appellees it should be pointed out that neither of them, although they profess to have had a great deal of experience with steam boilers, was familiar with Boiler Safety Order No. 850 of the California Industrial Accident Commission, which order provided that no boiler in active service should be left unattended. It would seem that a witness who presumes to testify as to methods of starting steam boilers should at least be familiar with this safety rule.

The proximate cause of the damage was not the fact that the fire started but that the fireman negligently left the fire when it was about to go out and caused the burning of the barge.

Appellees claim that the fire was due to the fact that the barge was not in good working condition. They then go into the realm of conjecture as to what might have caused the start of the fire. They don't know but offer various possibilities.

The Court itself was in doubt as to the cause of the start of the fire (Finding V, Ap. 228-229) finding that an explosion occurred, "due to * * * the failure

of the equipment of the barge to function properly, or by reason of defective fuel oil".

The Court also found (Finding V, supra) that the fuel line was not equipped with a strainer, but there was no testimony that a strainer would have prevented the fire or that the lack thereof in any manner contributed to the start of the fire. As a matter of fact, a strainer in the line would increase the probabilities of temporary stoppage.

The fact remains that the fire started during the generating period and that it is not unusual for a fire, during the generating period to stop. The fireman's theory was that, for some reason, the oil ceased to flow, and when it came on again, "the heat caused it to vaporize and spontaneous combustion ignited it". (Ap. 212.) He admitted that this was not unusual and that he should have been in attendance. He also stated that it was a simple matter to shut off the fuel if a stoppage of fuel occurred. (Ap. 52.) He had had this experience before and it was not an uncommon one. (Ap. 52.) The witness, Henry Foss, a man with 35 years' experience firing steam boilers, testified that he had had many backfires on boilers and had never lost any equipment because he was present to take care of the situation. (Ap. 125.)

Appellees intimate that the line between the tank containing the diesel oil and the burner was made of rubber. There is absolutely no testimony to that fact. Appellees also argue that the oil must have been dirty, but the fact is that the barge was operated for three days prior to the fire, and appellant could argue with

equal force that foreign substances, if any, in the fuel got there during that time.

In any event it seems perfectly clear that the loss was proximately caused by the failure of the fireman to be in attendance on the boiler at a time when there was a possibility that the fire might go out. Appellees do not profess to know what started the fire and we believe this is relatively unimportant. The proximate cause of the damage was not the original fire that started, but the negligence of the fireman in not being there to turn off the generating oil when the flame went out and in not being there to put the fire out when it did start.

CONCLUSION.

Appellant respectfully submits that:

1. The agreement under which the barge was operated was a demise charter.

2. The fireman Westall was the employee of appellees.

3. Appellees do not have the benefit of insurance nor is appellant estopped.

4. Appellant did not assume the risk of loss.

5. This is a simple case of a bailee's negligent loss, occasioned by the abandonment of the boiler by their fireman, Westall, while temporarily firing up with light, highly inflammable fuel—that this is the real issue is only slightly fogged by the multitude of defenses urged by appellees.

6. The decree be reversed, and the cause remanded to the trial Court for the trial of the issue of damages.

Dated, Stockton, California,
January 2, 1945.

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